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In the Supreme Court of the United States

OCTOBER TERM, 1962.

No. 76.

JAMES GALLICK,
Petitioner,

vs.

THE BALTIMORE AND OHIO RAILROAD COMPANY,
Respondent.

ON WRIT OF CERTIORARI
TO THE COURT OF APPEALS, CUYAHOGA COUNTY, OHIO,
EIGHTH JUDICIAL DISTRICT OF OHIO.

REPLY BRIEF OF PETITIONER.

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TABLE OF CONTENTS.

Introductory Statement	1
Statement	2
The Issues Framed by the Pleadings	3
The Facts	4
Argument	17
A. The Issues as Presented to This Court	17
B. There Was Ample Proof of Railroad Negligence to Support Petitioner's Claim Under the Federal Employers' Liability Act	20
C. The Jury Verdict on the Special Verdict Is Legally Sufficient to Support a Judgment for Petitioner and Does Not Support a Judgment for Respondent	23
D. There Is No Reason Contrary to the Assertion by Respondent That the Within Cause Should Be Remanded to the Ohio Supreme Court	26
Conclusion	28

TABLE OF AUTHORITIES.

Cases.

Atcheson, Topeka and Santa Fe Railroad Co. v. Preston, 257 F. 2d 933 (1958) 22

Atlantic and Gulf Stevedores, Inc., v. Ellerman Lines Ltd. et al., 369 U. S. 355, 82 S. Ct. 780 (1962) 24

Bowers v. Pennsylvania Railroad Company, 182 F. Supp. 756 (1960) 14

Braun v. Roux Distributing Co., Inc., 312 S. W. 2d 758 (Mo. 1958) 13

Cincinnati, New Orleans and Texas Pacific Railroad Co. v. Underwood, 262 F. 2d 375 (1958) 22

Eli Lilly & Co. v. Sav-On-Drugs, Inc., 366 U. S. 276, 81 S. Ct. 1316 (1961) 19

Elio v. Akron Transportation Company, 147 Oh. St. 293, 70 N. E. 2d 898 (1947) 24

Helvering, Comm. v. Gowran, 302 U. S. 238, 58 S. Ct. 154 (1937) 18

Klever v. Reid Brothers Express, Inc., 151 Oh. St. 467, 86 N. E. 2d 608 (1949) 23

Langnes v. Green, 282 U. S. 531, 51 S. Ct. 233 (1931) 17

Lee v. Blessing, 41 A. 2d 337 (Conn. 1945) 14

Menarde v. Philadelphia Transportation Co., 103 A. 2d 681 (Pa. 1954) 14

Michalic v. Cleveland Tankers, Inc., 364 U. S. 325, 81 S. Ct. 6 (1960) 13

Miller v. McAllister, 169 Oh. St. 487, 160 N. E. 2d 231 (1959) 24

Morales v. City of Galveston, 370 U. S. 165, 82 S. Ct. 1226 (1962) 25, 26

Peterson v. Kansas City Public Service Co., 259 S. W. 2d 789 (Mo. 1953) 14

Rice v. Louisville and Nashville Railroad Company, 131 N. E. 2d 808 (Ill. 1956) 14

Salem v. United States Line Co., 370 U. S. 31, 82 S. Ct. 313 (1962) 21

Urie v. Thompson, Trustee, 337 U. S. 163 (1949) 22

Williamson v. Rubich, 171 Oh. St. 253, 168 N. E. 2d 876 (1960) 27

Young v. Pennsylvania Railroad Co., 197 F. 2d 727 (1952) 22

Dictionary.

American Illustrated Medical Dictionary, Dorland, 22nd Ed., 1951 12, 13

Statutes.

Ohio Revised Code:

Sec. 2315.15 23, 24

Sec. 2315.17 23

28 U. S. C. 1257 19

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INTRODUCTORY STATEMENT.

The purpose of this reply brief is analyze the factual presentation contained in the brief of respondent and discuss questions of argument raised in the brief of respondent which were not discussed in the brief of petitioner on the merits.* Insofar as possible, repetition of petitioner's brief on the merits will be avoided except when necessary for purposes of clarity or continuity.

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* Abbreviations

Respondent's Brief on the Merits RB;
Petitioner's Brief on the Merits PB;
Printed Record R;
Plaintiff's Exhibits PX
Defendant's Exhibits DX.

STATEMENT.

Respondent on page 3 of its brief introduces its statement of facts as follows:

> "The statement will contain only such facts as are established either by the uncontradicted evidence or by resolving all conflicts in petitioner's favor, as this Court is required to do." (RB 3.)

After giving lip service to this fundamental doctrine, respondent then proceeds to present only those facts supporting its position. Interspersed with the factual references to the record are the editorial comments of respondent's counsel, all of which creates a misleading and confusing picture of the case as it was presented to the jury. Most of the factual presentation from the record by respondent consists either of respondent's cross-examination of witnesses to develop facts favorable to it, or the direct testimony of respondent's witnesses likewise tending to develop facts favorable to respondent. Much of the evidence favorable to petitioner was omitted from respondent's statement contained in its brief.

THE ISSUES FRAMED BY THE PLEADINGS.

The Trial Court submitted two specifications of negligence to the jury which are contained in their entirety on page 3 of respondent's brief. (RB 3.)

After reciting in its brief these two specifications of negligence, respondent then proceeds to editorialize in the following manner:

> "* * * it is clear that the gist of petitioner's cause of action presented but a single claim of negligence: that respondent 'knew' that by permitting unsanitary conditions to exist on its premises it would attract insects *harmful to man*, thereby creating an unreasonable risk of harm to its employees, including petitioner, * * *." (RB 3.) (Emphasis added.)

It is vital here to note that respondent chooses to add to the issues as framed by the pleadings an allegation referring to insects "harmful to man." Such an allegation nowhere appears in the petition nor in the specifications of negligence as submitted to the jury. This distinction is very important because in fact the gist of petitioner's claim was not the species of the insects attracted to the cesspool, *but the character of the cesspool itself.* The negligence claimed was in requiring petitioner to perform work duties close by a cesspool containing quantities of dead pigeons, rats, bugs and vermin, which cesspool as thus described was on railroad property under the control of respondent. (R. 3, and the special verdict, questions 1 through 12, R. 7 and R. 8.)

It requires, of course, no citation of authority that the knowledge referred to in specification of negligence number 6 as submitted to the jury may be actual or constructive. There was ample evidence in the Record that the conditions complained of existed for many, many years

without affirmative action to remedy the same on the part of respondent. The issue of knowledge or notice was resolved by the Court of Appeals against Respondent with the following statement:

> "We do know by overwhelming testimony that the pool of stagnant, vermin-infested water was alongside the Baltimore and Ohio tracks for many years prior to the alleged 'bite' suffered by Mr. Gallick. We know, by definite evidence, that insects were in and about this stagnant pool." (R. 626.)

THE FACTS.

In its brief, particularly pages 4 through 8, respondent indulges in a lengthy dissertation about the geography of the flats area of Cleveland and those portions of its right-of-way wherein petitioner, during the course of his working day, would have occasion to perform work duties. The obvious purpose of reference to this evidence is to suggest other sources of unsanitary conditions, besides those existing under the Columbus Road Bridge, which might have exposed petitioner to contamination.

Thus respondent makes reference to the fact that raw untreated sewage was being dumped into the Cuyahoga River, and further asserts "even closer at hand was a garbage dump at which rats and pigeons were accustomed to feed." (RB 5.) Further, respondent states:

> "The place at which petitioner was bitten is within 75 yards of the sewage-laden Cuyahoga River." (RB 5.)

Again on page 6 of respondent's brief, the following factual recitation is contained:

> "The old passenger station, so-called, is situated on Columbus Road, which is the main north-south artery on the east bank of the Cuyahoga, and the building is within 100 yards or so of the river itself." (RB 6.)

It is interesting to note, however, that respondent cannot point to any reference in the Record of any of these areas containing quantities of dead pigeons and rats with various forms of bugs and insects crawling about the same.*

It is difficult for petitioner to grasp a fair comparison between the moving currents of the Cuyahoga River (with or without sewage) heading toward Lake Erie and the stagnant cesspool maintained under the Columbus Road Bridge by respondent. Furthermore, it was undoubtedly difficult for the jury to grasp the likelihood of the biting insect coming from a great distance away, where petitioner may earlier have been working, when the place where he was bitten contained quantities of dead pigeons and rats with insects only a track width or approximately 10 feet away.

Later respondent makes the following fact allegation:

> "After leaving his lunch pail on the diesel, petitioner proceeded on foot to supervise some switching which was to be done in the 'spur yard' located west of the Seneca Street yard office, south of Columbus Road, and *immediately adjacent to the Cuyahoga River,* which at this particular point in its meandering northward course runs approximately east to west." (RB 8.)

Again, the purpose of this testimony was to suggest to this Court that there may have been a contaminating source by the River which could account for petitioner being bitten at a place other than under the Columbus Road Bridge or, at least, the insect getting on petitioner's pants leg at a place other than under the Columbus Road

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* Perhaps other property owners in the Flats did not permit dead animal matter to lay unattended until the hides rotted as did respondent.

Bridge. However, a close study of the Record references cited on page 8 of its brief by respondent fails to disclose that petitioner himself was immediately adjacent to the Cuyahoga River; in fact, it does not disclose how close petitioner was to the Cuyahoga River. Certainly the Record is completely silent as to whether there were any contaminating sources and particularly any insects of the character which bit petitioner in such areas. Thus again the jury was certainly entitled from the Record to reject respondent's argument of other contaminating sources and accept the overwhelming evidence that the most logical contaminating source was the cesspool itself. This Court has repeatedly held that such a choice must be by the trier of facts where the evidence and reasonable inferences to be drawn from the evidence is in conflict. See for example PB 28-33.

It is illogical to assume that the biting insect got up petitioner's pants leg at some other place but waited until he took his "one or two steps" under the bridge before inflicting upon his person the bite. It is logical to conclude that if the insect crawled up the inside of his khaki pants leg petitioner would not feel any movement. When he took his one or two steps this would cause the inside of his pants leg to brush up against his bare leg which, of course, could well be a source of irritation to any insect causing the same to bite him.

With reference to its property under the Columbus Road Bridge, respondent describes it as follows:

> "Respondent's property at this point is approximately 25 feet wide and is occupied by the river track, a single set of rails, which pass under the bridge." (RB 8.)

This fact recitation completely omits the all-important consideration that the cesspool and the drainage ditch

leading from the cesspool to a drainage manhole were likewise on respondent's property and under the direction and control of respondent. (R. 571, PX 12.) Inasmuch as the entire gist of petitioner's cause of action is founded upon respondent's negligence in the maintenance of this portion of its right-of-way, this omission is of vital importance.

On page 10 of its brief respondent sets forth a quote from page 157 of the Record to create the impression to this Court that petitioner did not even know that he was bitten by an insect. However, respondent in its brief failed to quote the rest of Record page 157 with the following testimony of Petitioner on cross examination:

> "Q. Do you recall, you were able to describe the size of it, weren't you, on your direct examination?
>
> A. Yes.
>
> Q. It was about 2 inches long and about half an inch in diameter?
>
> A. Yes.
>
> Q. Do you recall ever having seen under the bridge anything that looked as you have described the insect felt?
>
> A. Well, I have seen that size crawling on these dead hides.
>
> Q. You have?
>
> A. I have." (R. 157.)

Respondent claims that the witnesses were in accord that for many years prior to August 1954, there had existed a "small" standing pool of "drainage" rain water beneath the Columbus Road Bridge and that in the shade of the Bridge, it never dried up completely even in dry summer weather like that which preceded the alleged insect bite. (RB 11.) Respondent makes no reference to the Record to support this alleged factual recitation; in fact, the same is contrary to the great preponderance of the

evidence. This *stagnant* pool of water was not "small." See for example, petitioner's exhibit 12 (RB 71), a scale survey of the area involved which shows that the cesspool of contaminated water covered virtually the entire right-of-way underneath the Bridge west of the track. From this scale survey the swamp area or cesspool measures approximately 60 feet in length and 18 feet in width. Likewise, petitioner's Exhibits one through four, which are large photographs depicting the area, demonstrate that this was not a "small" standing pool of "drainage rain" water. Because of the bulk of these photographs they could not be included in the printed Record but counsel for both sides have agreed that the same may be viewed by the Court and used in argument by stipulation.

It was not the "shade of the Bridge" which kept this cesspool from drying up even in dry summer weather. The testimony established that it was the depressed level of this area under the Bridge as distinguished from the higher level of the drainage ditch which produced this collection of water, which is the reason that Engineer Neff suggested raising the level of the area so that the water could drain downhill. There was also testimony from its own employees that respondent permitted the manhole into which the drainage ditch emptied to become plugged. (R. 314, 315). (R. 354.)

With reference to the number of dead pigeons, the presence of dead rats, and the number of insects, though different witnesses may have their own opinions as to the numbers collected at different times, there was no substantial dispute that there were always some dead rats, dead pigeons, and insects in and about the area.

With reference to passers-by on the overhead street throwing rubbish and garbage onto the track below (RB 11), the testimony was that this did not create the hazard

because the garbage and tin cans thrown off the Bridge went into the ditch, were washed down into the drain, and were cleaned out by the section crew (R. 315). In fact, there wasn't any testimony in the Record that in the cesspool itself, or in the area where petitioner was bitten, there were any accumulations of garbage.

Respondent discusses the question of a slag fill to eliminate the cesspool and then to rebut the testimony of Engineer Neff that the same was practicable, respondent states as follows:

> "Later uncontradicted testimony disclosed that such filling would have caused 'pumping' or vertical movement of the ties and track during the passage of trains and thus created a risk of derailment." (RB 13.)

This so-called "uncontradicted testimony" was the testimony of the section foreman, Paul Delaria, which respondent neglected to buttress by the testimony of any competent civil engineer, although by the admissions of Delaria such testimony was available to respondent (R. 301). At best from respondent's point of view, the issue of proper maintenance procedures to eliminate the cesspool created a question of fact for the jury which was charged with the duty of passing upon the credibility of Neff as a witness and Delaria as a witness.

Respondent then, to buttress its defense of lack of notice refers to its witness, the union griever, that complaints of the conditions claimed by petitioner to exist under the Columbus Road Bridge (which claims were supported by Molnar, Rady and Clason) were never reported to the griever "despite elaborate grievance procedures." The griever in question was witness Joseph Patrick Corrigan called by the defense. Witness Corrigan, however, also testified as follows:

"Q. And those two or three dead pigeons that you saw, at the most at any one time, when did you see two, where did you see one, and where did you see the other?

A. Well, somewhere in that area laying on the ground. I just couldn't pinpoint where.

Q. How close can we get to the ditch?

A. I just couldn't pinpoint where I saw the one today and where I saw it the next day.

Q. Would you see that often, or would it be cleaned up and be nice and clean?

A. *I never saw it cleaned up.*

Q. *You never saw it cleaned up. You mean they were there all the time?*

A. *They would be there until they disintegrated or rotted or whatever happened.*

Q. *They lay there until they rotted and disintegrated, is that right, Mr. Corrigan?*

A. *Yes.*

Q. *And you worked in that area how long, sir?*

A. *Since 1941, 19 years.*" (R. 347.) (Emphasis added.)

Further in the cross-examination of witness Corrigan, his signed statement was produced and identified as petitioner's exhibit 24-A (R. 602, 603) and the witness was examined as follows, in part:

"Q. Now, we will go over to the next sentence: 'There has been dead birds and pigeons there, also, and perhaps the insects have come from that.' Did you say that?

A. Yes, I did.

Q. 'The only thing the railroad would have to do to get rid of this pool of water and sewage and other dead animals and birds would be to put in a sewage system.'- Did you say that?

A. Yes, I did.

Q. Did you further say, 'There may be a sewage

system there, but it may be clogged up.' Did you say that?

A. Yes, sir." (R. 353-354.)

Further witness Corrigan testified as follows:

"Q. And as safety man, you, your job was to report all unsafe conditions to the company on behalf of your co-workers, isn't that a fact?

A. Yes, sir.

Q. Did you ever report to the company anything about the condition that I just read to you from in your statement?

A. No, sir." (R. 355.)

Respondent attempts in its brief to attack petitioner's testimony on the medical causal relationship between the conditions complained of and his illness. (RB 14-21.) For example, respondent states to this Court as an alleged fact:

"By this time a large skin ulcer had developed on his left leg, but others *shortly* followed on far removed parts of his body, *where there was no claim of any bite*, such as under the left arm and on the right leg (R. 580)." (RB 14.) (Emphasis added.)

Examination of the Record (R. 579) discloses that petitioner had a biopsy of an ulcer of his left leg at Marymount Hospital on September 22, 1954.* There was a debridement of this ulcer on September 28, 1954. There was a skin graft split thickness type performed surgically on October 12, 1954. *It was not until after October 12, 1954, and these purported attempts at surgery, that additional lesions were noted on petitioner's body.* Thus, the Record (579) shows the excision of a lesion of the left side of the neck on October 22, 1954, and the excision of multiple ulcers on November 23, 1954. The reference on page 14 of

* The date of the bite was fixed as approximately August 10, 1954 (Exhibit J, R. 10).

respondent's brief to page 580 of the Record pertaining to multiple areas of pyoderma granulosa were from a history and physical examination performed January 4, 1955. (PX B-2, R. 579, 580.) This hardly supports respondent's contentions that other ulcerations "on far removed parts" developed "shortly" after the ulceration complained of. Furthermore, the testimony of Dr. Ippolito discloses, with reference to his examination of September 16, 1954 (R. 174) as follows:

> "Q. When you examined him that day did he have one or more than one lesion?
>
> A. Just one.
>
> Q. And did you examine his body besides that area?
>
> A. Yes, yes, sir." (R. 174.)

Respondent then makes references to those portions of the Record in which petitioner's illness was described as "pyoderma gangrenosa" and that all of the doctors "agreed that this term was nothing more than descriptive of his symptoms." (RB 15 et seq.)

While respondent is correct in this contention, the inference which respondent attempts to create from its brief is that because the diagnosis of an illness is descriptive, such illness may not be causally related to trauma. Reported cases are to the contrary. Thus, medically Buerger's Disease is known as "thromboangiites obliterans" which is defined in the medical dictionary (for example, *The American Illustrated Medical Dictionary*, Dorland, 22nd Ed., 1951) as "an inflammatory and obliterative disease of the blood vessels of the extremities, more frequently the lower extremities, running chiefly in young men and leading to ischemia of the tissue and gangrene. Called also Buerger's disease and pre-senile spontaneous gangrene." This is purely a descriptive diagnosis, and in

fact, admittedly in the medical profession, the etiology of Buerger's disease is unknown. Nevertheless, this Court found little difficulty in holding that a cause of action for aggravation of a pre-existing Buerger's Disease may be stated despite its unknown etiology. See for example, *Michalic v. Cleveland Tankers, Inc.*, 364 U. S. 325, 81 S. Ct. 6 (1960).

In the case of *Braun v. Roux Distributing Co., Inc.*, 312 S. W. 2d 758 (Mo. 1958), plaintiff contracted a rare disease known as "Allergic Periarteritis Nodosa"* allegedly from the use of defendant's oil shampoo tint. The case reports extensive medical testimony by both sides with all doctors admitting that the etiology of the disease was unknown but the prevailing medical *theory* was that the disease was caused by allergy. Plaintiff's medical experts testified that plaintiff contracted the disease because the product contained an allergen, *although there were no prior cases in medical case history where this allergen had ever before been known to cause this particular disease.* The Supreme Court of Missouri rejected a contention that the verdict in favor of plaintiff could only be arrived at by speculation and guesswork, but on the contrary took the position that the jury could well find sufficient evidence of substantial probative force of causal connection to justify the verdict.

Although the etiology of cancer is by common knowledge in the realm of the medical unknown, there are many recent cases which have affirmed substantial verdicts for plaintiffs on medical opinion that a particular trauma bore

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*"An inflammatory disease of the coats of the small and medium sized arteries of the body with inflammatory changes around the vessels and marked by symptoms of systemic infection." (*The American Illustrated Medical Dictionary*, Dorland, 22d Ed., 1951.)

a causal relationship to the resulting cancer. See for example, *Peterson v. Kansas City Public Service Co.*, 259 S. W. 2d 789 (Mo. 1953); *Menarde v. Philadelphia Transportation Co.*, 103 A. 2d 681 (Pa. 1954); *Lee v. Blessing*, 41 A. 2d 337 (Conn. 1945).

Another disease entity in a descriptive etiology classification is "Reflex Sympathetic Distrophy" sometimes known as "Causalgia." With the basic etiological factor being unknown, medical testimony of causal relationship has been sufficient to sustain a verdict. See for example, *Bowers v. Pennsylvania Railroad Company*, 182 F. Supp. 756 (1960); *Rice v. Louisville and Nashville Railroad Company*, 131 N. E. 2d 808 (Ill. 1956), both of the foregoing being F. E. L. A. cases.

It is useless to belabor this brief with additional factual examples as no two cases are exactly alike on their facts. The foregoing are at least illustrative of the prevailing modern legal theory that a precise medical etiology is not a condition precedent to the recovery of damages. Clearly in the instant case, with positive direct testimony by treating physicians of a medical-legal causal relationship between petitioner's condition and his illness there was sufficient evidence for the jury and the Trial Court to reach a conclusion of causal relationship. (PB 14, 15.)

Apparently in recognition of this deficiency in its argument, respondent seeks to attack this testimony of a direct causal relationship by the simple statement that a lack of specialized knowledge of insect life by petitioner's physicians disqualifies said physicians from expressing expert opinion on the issue of causal relationship. Respondent argues that only an expert entomologist would be qualified to give expert opinion on the subject. (RB 21.) While it is a general legal truism that an expert witness must be an expert to give opinion evidence in answer

to a hypothetical question, it does not necessarily follow from this general proposition that only an entomologist is qualified to give opinion evidence as to whether the disease-producing conditions in the cesspool maintained by respondent could and did produce the illness suffered by petitioner. The Trial Court and the Court of Appeals took the position that there was no error in the hypothetical questions asked the physicians on this subject and that they were qualified to give expert testimony pertaining to same.*

In fact the entomologist called by respondent admitted that he was not qualified to give such an opinion. See for example, the following testimony (from the cross examination of Dr. Stearns):

"Q. Have you ever cultured dead rats?

A. I have taken only a four-hour course in bacteriology in pre-medical training.

Q. Four hour?

A. That is the regulation course.

Q. Have you ever cultured dead rats?

A. No.

Q. Have you ever cultured dead pigeons?

A. No.

Q. You do not know what if any bacteria would be prevalent or be found on decaying dead rats?

A. I cannot give an official opinion or professional opinion on it.

Q. You don't think you are qualified, is that it?

A. I am an entomologist.

Q. And the same with dead pigeons?

A. That's right." (R. 366.)

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* This issue was raised to the Court of Appeals by respondent's assignment of error No. 4 (R. 621), and to the Supreme Court of Ohio on respondent's cross motion to certify, cross assignment of error II (R. 636), and respondent's motion for rehearing, question (2) (R. 641).

With further reference to Dr. Stearns, the expert entomologist of respondent, he testified that in his experience a giant water bug in its largest size would not be over about an inch and a half (R. 372, R. 373), that such bugs "don't normally bite" and their ability to crawl is "very feeble." (R. 368.) To counter this testimony, petitioner produced James R. Skelly of the Museum of Natural History who brought with him a collection of specimens of aquatic bugs from the Museum, at least one of which measured two and one-half inches. Skelly testified from observation and experience as a collector that it is common practice for such a water bug in the Cleveland area to be that size (R. 498), they do crawl (R. 500), and he has been personally bitten by the species (R. 501).

We believe that any fair reading of the entire testimony of Dr. Stearns in conjunction with the Record as a whole makes it clear that there was substantial impeaching evidence to his testimony showing his bias toward respondent which flew him in from Newark, Delaware. Dr. Stearn's only exposure to the locale complained of was shortly before testifying (R. 361).

It is also not true, contrary to the assertion in Respondents' Brief that "according to the uncontradicted medical testimony, petitioner's life expectancy has been reduced to a 'probability' of about four or five years." (RB 14, 15.) This assertion comes from the following statement from respondent's medical expert, Dr. Davis, who testified:

> "Well, I think that this disease *may* continue over a period of the next four or five years hit something vital which will take his life." (R. 430.) (Emphasis added.)

However Dr. Davis later qualified even this speculative prognosis as follows:

"Q. Then is it not a probability that it will continue to be external, and not internal, probability, Doctor?

A. I think if put that way I would say there is a probability.

Q. That it will continue to be external?

A. Yes, sir." (R. 439.)

ARGUMENT.

A. The Issues as Presented to This Court.

Respondent apparently recognizing the weakness of the position of the Court of Appeals seeks to enlarge upon the issues presented by the judgment and journal entry of the Court of Appeals to which Court the instant writ of certiorari is directed. In support of its position in this regard, respondent states that:

> "It has been the undeviating rule of this Court that respondent is free to urge affirmance, and this Court is free to affirm, upon any ground which supports the judgment below, even though such ground may not have been considered by the lower court." (RB 27 and 28.)

In support of this proposition respondent first cites *Langnes v. Green*, 282 U. S. 531, 51 S. Ct. 233 (1931). This case was an action in the District Court for limitation of liability while a Jones Act action was pending in the State Court for personal injuries of the seaman. The Circuit Court of Appeals held that the District Court was without jurisdiction to entertain the petition for limitation of liability in the District Court. This Court held that it had the power to entertain the question of the jurisdiction of the District Court although the same was not being urged on the petition for a writ of certiorari because a federal question was presented. However, it must be noted

that even here this Court reiterated its long-standing rule of practice that:

> "A party who has not sought review by appeal or writ or error will not be heard in an appellate court to question the correctness of the decree of the lower court."

In the instant case, there is no cross-motion for certiorari pending by the respondent nor cross-appeal. As noted by Rule 19, Subsection 1(a), the sound discretion to review a case on certiorari from a state court is:

> "(a) Where a state court has decided a federal question *of substance* not theretofore determined by this Court, or has decided it in a way probably not in accord with applicable decisions of this Court." (Emphasis added.)

As we shall demonstrate, the only Federal questions in the instant case are whether questions of fact as to the negligence of respondent railroad were presented from the Record, and whether questions of fact on causal relationship between negligence and injury were presented by the Record in this action under the Federal Employers' Liability Act. Of these issues, petitioner takes the position that only the issue of causal connection is a federal question "of substance" as this was the sole ground on which the Court of Appeals reversed the judgment of the trial court.

Respondent next cites *Helvering, Comm. v. Gowran,* 302 U. S. 238, 58 S. Ct. 154 (1937). In this case, a reiteration was made of the general legal principle that in a review of judicial proceedings, the rule is settled that if the decision below is correct, it must be affirmed although the lower court relied upon a wrong ground or gave a wrong reason. The immediate question, however, before this Court was whether this principle could be applied to a review of decisions of the Board of Tax Appeals and certiorari was granted and a pronouncement made by this

Court that this principle does so apply. Again a substantial federal question was before this Court.

The final decision cited by respondent is *Eli Lilly & Co. v. Sav-On-Drugs, Inc.*, 366 U. S. 276, 81 S. Ct. 1316 (1961). In this case, the petitioner, an Indiana corporation, was seeking to enjoin respondent in the New Jersey Courts from selling below fixed prices under the New Jersey Fair Trade Act, but the New Jersey Courts refused to entertain the action because petitioner was not registered in New Jersey. The case involved an important Federal question; namely, interpretation of the "commerce clause" with reference to "drummer cases" and what constitutes "local business." However, the following from the majority opinion is relevant, page 284:

> "So even if the state court had rested its conclusions on an improper ground, this court could not, in view of the undisputed facts establishing its validity declare a solemn act of the State of New Jersey unconstitutional."

Thus, in summary all of the precedents cited by respondent concern substantial Federal questions which this Court considered itself called upon to pass upon. Respondent now seeks to extend this principle to a request of this Court to consider questions of procedure in the Ohio Courts and interpretations of Ohio Trial Procedure Statutes, although no claim is made by respondent that such statutes are unconstitutional, or in any way involve a Federal question. A review by this Court of such questions of Ohio Procedure, would appear to be clearly outside of the purview of the Act of June 25, 1947, c. 646, 62 Stat., 929, Title 28, USC Sec. 1257 establishing jurisdiction in this Court on writ of certiorari to review decisions by the highest court of a state in which a decision can be had where questions arise under the Constitution or the Stat-

utes of the United States. Especially would this be so in the instant case where respondent has had a complete appellate review in the Ohio Courts on all of its claims of error concerning the procedural aspects of this case. Respondent itself concedes this to be the law. (RB 43, and footnote citations.)

B. There Was Ample Proof of Railroad Negligence to Support Petitioner's Claim Under the Federal Employers' Liability Act.

Respondent takes the position that petitioner's basic theory of negligence is that respondent "knew" that the alleged unsanitary conditions on its premises would attract insects "dangerous to humans," and that petitioner was bitten and diseased by one of the insects so attracted. (RB 28.) Examination, however, of the amended petition which framed the issues for the jury makes it rather clear that petitioner did not at any time allege or claim that insects "dangerous to humans" formed the basis of his cause of action. *It is not the character of the insect, but the character of the premises which forms the basis for petitioner's cause of action.* While it may be true, as claimed on page 29 of respondent's brief, that the mere presence of unidentified insects does not imply danger, we do believe that it is common experience that the presence of a cesspool containing quantities of rotted hides of dead pigeons and rats with various forms of insects crawling about the same, do imply an unsanitary, unhealthful condition capable of producing disease. This is especially so in the instant case when competent medical witnesses testified that this was in fact the cause of petitioner's illness.

However, we further believe, contrary to the assertions reiterated throughout respondent's brief, that expert

testimony would not be necessary for the jury to reach such a self-evident conclusion. Thus, in the recent case of *Salem v. United States Line Co.*, 370 U. S. 31, 82 S. Ct. 313 (1962), this Court re-stated the long-standing legal proposition that on matters knowledgeable to the ordinary mind, a jury is quite competent and permitted to draw an inference of negligence from existing physical facts without the aid of expert testimony. In that case, which was an action under the Jones Act, a seaman fell as he went to his post in the crow's nest. It was held error for the Court of Appeals to order a new trial on the ground that the jury could not determine, in the absence of supporting testimony by an expert in navel architecture, a claim that the shipowner had failed to equip the ship with necessary and feasible safety devices to prevent such a mishap. Substitute "entomologist" for "naval architect" and virtually the same legal proposition exists in the instant case. Clearly, the jury without the aid of expert testimony was capable of drawing the conclusion that the unsanitary conditions complained of were capable of and did, in fact, cause the disease complained of. Particularly so here where the initial lesion which ulcerated followed and developed in a close continuous time relationship to the bite.

Respondent attempts to support its position by citing cases dealing with dangerous co-employees. Since it is self-evident that a vicious employee is a responsible third person, we do not believe that such cases can be equated with the instant fact situation dealing with a static condition on premises under the control of respondent which produced the harm complained of. It is not important what species of insect bit the petitioner, or whether such insect would normally be of a class harmful to man. The important consideration is whether the insect did in fact

come from the deleterious condition of the railroad's premises which petitioner respectfully contends was a question of fact to be resolved by the jury and not by the reviewing court under the circumstances presented. (See Exhibit L, R. 10.)

It is, of course, well established by prior precedent that "injury" as used in the Federal Employers' Liability Act includes illness or disease resulting in whole or in part from a negligent condition of railroad premises. See for example, *Urie v. Thompson, Trustee*, 337 U. S. 163 (1949); *Young v. Pennsylvania Railroad Co.*, 197 F. 2d 727 (1952); *Cincinnati, New Orleans and Texas Pacific Railroad Co. v. Underwood*, 262 F. 2d 375 (1958); and *Atcheson, Topeka and Santa Fe Railroad Co. v. Preston*, 257 F. 2d 933 (1958).

Thus, assuming that a federal question is presented as to whether the Record in the instant case discloses negligence on the part of respondent railroad, we feel that there was ample evidence of such negligence and that further review on this issue is unnecessary. The jury specifically found negligence in one or more of the respects claimed in the petition (R. 11 and R. 12), the Court of Appeals in its review of the case likewise was satisfied that petitioner had met his burden of proof on the issue of negligence under the Act. (PB 29.) Inasmuch as the entire issue of causal relationship was discussed at length in petitioner's brief on the merits, further discussion here is not warranted.

C. The Jury Verdict on the Special Verdict Is Legally Sufficient to Support a Judgment for Petitioner and Does Not Support a Judgment For Respondent.

Study of the special verdict (R. 7 through 14) reveals that the jury in answer to special inquiry found respondent negligent and a proximate relationship between the conditions complained of and the present physical condition of plaintiff. Respondent, however, contends that the jury's answers on the question of foreseeability of harm foreclose a judgment in favor of petitioner and make mandatory a judgment in favor of respondent. Respondent vigorously pressed this point in its appeal to the Court of Appeals for Cuyahoga County and in its cross-motion to certify to the Supreme Court of Ohio.* At best, however, this issue raises questions of Ohio Procedural Law as to the rendering of final judgment upon findings of fact by the jury. See *Ohio Revised Code*, Section 2315.17. (Appendix G, of petitioner's brief on the merits.) The real issue here is what constitutes a determinatives issue under the Special Verdict Statute of Ohio, namely, *Ohio Revised Code*, Section 2315.15 (set forth in Appendix E of petitioner's brief on the merits). Quite obviously both the Trial Court and the Court of Appeals for Cuyahoga County took the position in this regard that the determinative issue was negligence, and the jury specifically having found negligence, the only remaining issue was one of causal relationship. Under Ohio Law, it is very clear that such answers of fact by the jury must be liberally construed to conform with the intent of the jury. See *Klever v. Reid Brothers Express, Inc.*, 151 Oh. St. 467, 86 N. E. 2d

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* See assignment of error 11 before the Court of Appeals (R. 621), cross assignment of error VIII to the Supreme Court of Ohio (R. 636), and question (1) of respondent's motion for rehearing to the Supreme Court of Ohio (R. 641).

608 (1949); *Elio v. Akron Transportation Company*, 147 Oh. St. 293, 70 N. E. 2d 898 (1947). The Federal view is substantially the same. See *Atlantic and Gulf Stevedores, Inc., v. Ellerman Lines Ltd. et al.*, 369 U. S. 355, 82 S. Ct. 780 (1962).

> "Where there is a view of the case that makes the jury's answers to special interrogatories consistent, they must be resolved that way. For a search for one possible view of the case which will make the jury's findings inconsistent results in a collision with the Seventh Amendment. *Arnold v. Panhandle & Santa Fe Railroad Company*, 353 U. S. 360. *Cf. Dick v. New York Life Insurance Company*, 359 U. S. 437, 446." (p. 355.)

The alleged issue raised by respondent of foreseeability is not a determinative issue at all under the Ohio Special Verdict Statute, *Ohio Revised Code*, Section 2315.15. Subsequent to the judgment of the trial court in the instant case, the Supreme Court of Ohio rendered its opinion in the case of *Miller v. McAllister*, 169 Oh. St. 487, 160 N. E. 2d 231 (1959). From that Opinion applying the rationale of the Court to a Federal Employer's Liability Act, particularly to the issues in the instant case, the determinative issues would be as follows:

1. Was respondent negligent in one or more of the particulars alleged in the petition?

2. Did such negligence result in whole or in part in injury to the petitioner?

(Cf. for example questions (1) and (2) of Respondents' Brief, pp. 1 and 2, as presenting the determinative issues of fact to be resolved by the jury.)

The substance of these determinative issues is contained in the Special Verdict form submitted by the Court and resolved by the jury in favor of petitioner herein.

[Exhibit P (R. 11, R. 12), Exhibit Q (R. 12), Exhibit R (R. 12), and Exhibit S (R. 12).]

To further buttress its argument of the necessity of a specific finding of foreseeability, respondent cites this Court to its recent decision, *Morales v. City of Galveston*, 370 U. S. 165, 82 S. Ct. 1226 (1962). We do believe, however, that a careful reading of the *Morales* case discloses that it is not precedent in support of the position urged by respondent in the instant case. The *Morales* case was an action in unseaworthiness by longshoremen for injuries from noxious fumes which occurred when fumigated grain was shot into the hold. The trier of fact was the District Court which found neither negligence nor unseaworthiness. As noted on page 167 of the Majority Opinion of this Court:

> "Specifically, the Court found that the City had not itself applied the fumigant to the grain in question, and that neither of the respondents knew, or in the exercise of reasonable care should have known, that the grain had been improperly fumigated at an inland point *by someone else*." (Emphasis added.)

Again, on page 171 of the Majority Opinion this Court stated:

> "What caused injury in the present case, however, was not the ship, its appurtenances, or its crew, but the isolated and completely unforeseeable introduction of a noxious agent *from without*. The trier of the facts ruled, under proper criteria, that *The Grelmanion* was not in any manner unfit for the service to which she was put, and we cannot say that his determination was wrong." (Emphasis added.)

The Opinion in the *Morales* case makes it clear that where there is a defective or non-functioning part of a vessel, its appurtenance, or its crew, contributing to cause injury, then knowledge or notice is not necessary, and

hence, of course, neither would foreseeability be necessary. It is only because on the facts of the *Morales* case a toxic agent *without knowledge* to respondents was introduced by a responsible third person that the vessel was found to be seaworthy. It seems quite clear from a reading of the *Morales* case that had there been some defect in the vessel, its appurtenance, or crew, which contributed to cause the injury, then the decision would have been the other way. In the case at bar the cesspool with the rotted hides of dead pigeons and rats with crawling insects and the inadequate measures of respondent's section crew to clean up this health hazard are comparable to a defective vessel and crew of a ship. Most important, however, is that the *Morales* case itself dealt with a question of fact. In other words, the trier of fact did not find negligence or unseaworthiness. This Court merely affirmed the trier of fact. *In the case at bar, however, the trier of fact did find negligence and causal relationship. A reviewing court upset or set aside the finding of the trier of fact.* The *Morales* case therefore is hardly precedent for the issue presently before this Court.

D. There Is No Reason Contrary to the Assertion by Respondent That the Within Cause Should Be Remanded to the Ohio Supreme Court.

Respondent devotes the remainder of its argument to the proposition that unless this cause is remanded to the Ohio Supreme Court an affirmance of the Trial Court's judgment will confront respondent with a final judgment without any authoritative decision of the Court of Last Resort of Ohio on numerous questions of Ohio law. (RB 42-44.) Respondent readily admits that all of the various questions of Ohio Procedure are outside of the scope of review to this Court. (See footnote RB 43.) Of course, to

be consistent, respondent should have likewise conceded that the question of the sufficiency of the special verdict, the rulings of the Trial Court on the hypothetical questions to petitioner's physicians, and other matters of trial procedure, do not present judicial questions for review by this Court. Be that as it may, however, petitioner feels compelled to correct what may be an erroneous impression, namely that respondent has not had a final hearing in the Ohio courts.

The law is well settled in Ohio that a party has but one right of appeal and a party does not have the right to expect a decision by the highest Court of the State, nor is there any denial of an appellant's full rights when after a full, fair and thorough consideration of the issues by the Court of Appeals, further review by the Supreme Court of Ohio is deemed unnecessary. This is made abundantly clear from the recent case of *Williamson v. Rubich*, 171 Oh. St. 253, 168 N. E. 2d 876 (1960). From the per curiam opinion of the Court, the following, which thoroughly explains the Appellate Law of Ohio, is contained:

> "Section 6, Article IV of the Ohio Constitution, provides that judgments of the Courts of Appeals of this State shall serve as the ultimate and final adjudication of all cases except those involving constitutional questions, conflict cases, felony cases, cases in which the Court of Appeals has original jurisdiction, and cases of public or great general interest. *Except in these special circumstances, it is abundantly clear that in this jurisdiction a party to litigation has a right to but one appellate review of his cause.* (See, also, Section 2505.29, Revised Code.") (pp. 253, 254.) (Emphasis added.)

The procedural questions which respondent in its brief to this Court seeks to have this Court remand to

the Supreme Court of Ohio, do not fall within any of the classes of exceptions set forth in the above citation. By denying respondents cross-motion to certify and motion for re-hearing the Supreme Court of Ohio has already decided that such questions were not of public or great general interest so as to invest that court with jurisdiction. All of the procedural questions were given a thorough review by the Court of Appeals in the instant case and it was found by that Court that appellant did not present any question of error to its prejudice. Now in effect respondent asks of this Court that the case be remanded to the Supreme Court of Ohio which of necessity means respondent is asking of this Court that it find questions of public or great general interest under the Law of Ohio so to compel the Ohio Supreme Court to review the case when the Ohio Supreme Court itself did not find such questions to exist.

CONCLUSION.

Petitioner respectfully reiterates the position taken in his brief on the merits, namely that the facts disclosed in the Record support a judgment for petitioner on the only Federal questions presented, namely that the respondent was negligent in one or more of the respects claimed and that such negligence did in whole or in part produce the injury of which petitioner complains. While respondent is seeking to have this Court pass upon questions of Ohio Procedural Law, or in the alternative remand such questions to the Ohio Supreme Court, such would be inconsistent with any of the Federal questions involved and the role of this Court on a petition for a writ of certiorari raising strictly Federal questions. Furthermore, since all of these questions of Ohio Procedure which re-

spondent is seeking to re-litigate in this Court have been given a thorough review to the full extent provided under Ohio Appellate Law, further review in this respect is not warranted.

Respectfully submitted,

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